SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

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October Term 1967
No. 254

BERNARD KAPLAN; ALBERTO BERUMEN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

A Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

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A Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Petitioners Bernard Kaplan and Alberto Berumen pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on March 1, 1967.

OPINIONS BELOW.

The District Court for the Central District of California rendered no written opinion in this matter. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, pages 6-16, is as yet unreported.

JURISDICTION.

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 1, 1967. An Order denying a Petition for Rehearing, which was filed within the prescribed time allowed therefore, was denied

by the Court of Appeals on April 18, 1967. (A copy of the Order denying the Petition for Rehearing is printed in Appendix B hereto, *infra*, page 6.) An Order extending time to file Petition for Writ of Certiorari was subsequently granted by this Court, extending such time to and including June 17, 1967. The jurisdiction of this Court is involked under 28 U.S.C., §1254(1).

QUESTIONS PRESENTED.*

1. Whether Petitioners were deprived of "assistance of counsel" within the meaning of the Sixth Amendment to the Constitution of the United States by being forced to trial using the same attorney, despite an actual conflict in their respective interests which was or should have been known to the court.

2. Whether Petitioners were denied Due Process of Law by virtue of the prejudice suffered by them resulting from the illegal and improper examination by the court, without Petitioners' consent or request, of certain reports compiled by government agents pertaining to the instant prosecution.

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*Other questions which will be raised should certiorari be granted:

1. Whether Petitioner Kaplan was denied Due Process of Law by virtue of being improperly advised of his constitutional rights before he allegedly made certain prejudicial admissions which were used as a basis for his conviction on Counts three and five of the indictment herein.

2. Whether Petitioner Kaplan, as a matter of law, could be found guilty of aiding and abetting as charged in Count three of the indictment, when he was not charged as a principal in said count, and when the only party therein charged as a principal was acquitted.

3. Whether the Trial Court improperly denied Petitioner Kaplan's Motion to Supress six $100.00 counterfeit Federal Reserve Notes which were admitted into evidence, despite the fact that they were obtained as a result of an illegal search and seizure, and which evidentiary items served as a basis for said Petitioner's conviction under Count five of the indictment herein.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

STATEMENT.

The constitutional and statutory provisions involved in the instant Petition are set forth in Appendix A, *infra*, pages 1-5.

On January 13, 1965, a five-count indictment was returned by the Grand Jury and was filed against Petitioners and one Ronald N. Reinhardtsen in the United States District Court of the Southern District of California, Central Division. Count One of the indictment charged Petitioners Bernard Kaplan and Alberto Berumen, together with Ronald N. Reinhardtsen, of conspiring together "to pass, utter, publish and attempt to pass, utter and falsely make, forged, and counterfeited obligations of the United States" in violation of Title 18, United States Code, Section 371. All of said parties were subsequently acquitted on this count. [R. 372.] Counts 2 and 4 of the indictment charged Petitioner Berumen with unlawfully passing a counterfeit Federal Reserve Note in violation of Title 18, United States Code, Section 472; while Count Three made the same charge against Defendant Reinhardtsen and additionally charged Petitioner Kaplan with aiding, abetting, counseling, inducing and procuring the commission of Defendant Reinhardtsen's alleged offense in violation Title 18, United States Code, Sections 2 and 472. Count Five of the indictment charged Petitioner Kaplan and Defendant Reinhardtsen with a further violation of Title 18, United States Code, Section 472—*i.e.*, possessing and concealing with intent to defraud six Federal Reserve Notes, all of which were counterfeit.

A. Pretrial Proceedings.

Petitioners were arraigned on January 25, 1965, before the Honorable Charles H. Carr, District Judge. At the time of arraignment both Petitioners were represented by Attorney Howard E. Beckler. Petitioners' respective pleas, however, were continued until February 8, 1965, at which time Petitioners pled not guilty to the respective counts of the indictment. The matter was set for trial. On March 4, 1965, a Motion to Suppress evidence was filed on behalf of Defendant Reinhardtsen, which motion was subsequently joined in on behalf of Defendant Kaplan. [R. 15.] This Motion to Suppress was opposed by the government, and continued for hearing until the time of trial.

On the date originally set for trial, Monday, March 29, 1965, Attorney Beckler made a Motion on behalf of Petitioners—specifically Petitioner Kaplan—for a continuance predicated upon the grounds that on the prior Saturday at a final interview with both Petitioners, he was provided with certain information not previously given to him by Mr. Kaplan, which established a definite conflict of interest between the Petitioners, both of whom he was then representing. Attorney Beckler further informed the Court that he made his motion as an officer of the Court; that "there is a definite conflict of interest between the two Defendants Berumen and Kaplan;" that the motion was not a "dilatory tactic" on his part; that the information was not something he could have previously ascertained; that he was sure that such information would "inhibit" Petitioners' testimony; and that he felt he could no longer properly represent both Petitioners and had advised Petitioner Kaplan that he would continue to represent only Petitioner Berumen. [R. viii-x.]

On examination by the court Mr. Beckler declared that he had learned from Mr. Kaplan that facts underlying certain statements said Petitioner had previously made were "extremely essential to the defense of Mr. Berumen." [R. xii.]

The Court proceeded to inquire whether a continuance until Thursday would aid in permitting Mr. Kaplan to obtain new counsel. Both Messrs. Beckler and Kaplan, however, questioned whether it would be possible to obtain and prepare new counsel by said date. [R. x.] When counsel for the Government opposed a continuance because it would inconvenience some of its witnesses, the Court then set the trial for Thursday, April 1, 1965. Mr. Beckler, however, after first stating that he had other matters at that time and was otherwise engaged up to April 19, 1965 [see R. xiii, xiv], further stated that if the matter could not be continued until April 19, he would arrange for petitioner Kaplan to have "competent prepared counsel" who would answer ready "today". [March 29, 1965.] [R. xiv.] Thereupon the Court set the matter for trial on the following morning, March 30, 1965.

B. Evidence and Testimony at Trial.

1. Conflict Discussion.

At the outset of the trial Petitioners and Defendant Reinhardtsen orally and in writing advised the Court that they desired to proceed to trial without a jury. Both Petitioners Kaplan and Berumen stated that they had given the matter full consideration before making such waivers. All the attorneys also consented to the waivers. [R. 1-9.] Attorney Beckler then notified the Court that he believed the conflict problem which he

had earlier raised was resolved because there was no longer a "contingency of a jury trial." Petitioners also stated that they had discussed the matter with Beckler and had been advised by him that there was no further conflict because of the jury waiver. [R. 12-14.]

2. Consideration of Non-Evidentiary Government Reports.

During the course of the trial and shortly after Treasury Department Agent Tomsic, chief Prosecution witness, took the stand, Petitioners' attorney became aware that the Government attorney had given the court certain reports and correspondence. These were carefully read and examined by the judge. [These reports are a part of the record herein and are designated as United States Treasury Secret Service Treasury Department Report Form No. 1588, File No. J-4-3-CO-2344-11, dated February 2, 1965, and letter from Treasury Department to Manuel L. Real, dated January 5, 1965, bearing File No. J-4-3-CO-2344-11.] [R. 159.] Counsel for Petitioner's denied the right of the judge to examine and consider such documents because there had been no motion by any of the defendants to require the production of such documents under Title 18, United States Code, Section 3500, *et seq.*, because said counsel were unaware of the judge's examination until such time that the documents had already been read; and because the documents in question contained substantial hearsay and other prejudicial matter. The trial judge, however, concluded that his examination was proper. [R. 159-162.]

3. Evidence Offered at Trial on Substantive Issues.

There was evidence offered at trial to the effect that on two separate occasions,—*i.e.*, on December 6th and 19th of 1964,—Petitioner Berumen had allegedly passed a counterfeit $100.00 Federal Reserve Note.

Other evidence offered at trial tended to show that on December 17, 1964, defendant Reinhardtsen had passed a counterfeit $100 Federal Reserve Note to an employee of the G. R. Kirk Company, that defendant Reinhardtsen was arrested by Agent Tomsic on December 19, 1964, at the Kirk Company lot; that the automobile defendant Reinhardtsen had in his possession at the time of arrest was sometime thereafter removed to the federal garage; that said automobile was allegedly seized for carrying couterfeit money; and that on December 20, 1964, Agent Tomsic discovered six counterfeit $100 Federal Reserve Notes located in an envelope in the truck of the automobile. The notes and envelope in question were admitted into evidence following denial of Petitioners Motion to Suppress and over their objections to the introduction of said evidence. [R. 318-319.]

Other evidence offered was that Petitioner Kaplan was apparently with defendant Reinhardtsen at the Kirk Company lot on December 17; that the automobile carrying the six counterfeit notes and envelope was in the general possession of Petitioner Kaplan; that on December 19, Petitioner Kaplan was questioned by Agent Tomsic, was advised that any statement he made could be used against him (but not that he had the right to remain silent) [R. 248], but was not taken into custody. Other evidence was offered to show that on December 20 and subsequent to the search of the automobile, Mr. Kaplan acted suspicious while removing certain property from the automobile. Petitioner Kaplan was not advised of his constitutional rights on the 20th prior to the time he allegedly made these suspicious movements. [R. 251-253.]

C. Decision of the Courts Below.

Following denial of the Motion to Suppress Evidence and conclusion of the remainder of the trial, the trial judge found that none of the defendants were guilty as to Count One of the indictment (*i.e.*, there was no conspiracy); that defendant Reinhardtsen was not guilty as to Counts Three and Five of the indictment; but that Petitioner Berumen was guilty as to Counts Two and Four of said indictment, while Petitioner Kaplan was guilty as charged in Counts Three and Five thereof.

Thereafter Petitioner Kaplan was sentenced concurrent terms of three (3) years each on Counts Three and Five of the indictment. Petitioner Berumen was also sentenced to three (3) years each on Counts Two and Four of the indictment to run concurrently. Petitioners Berumen and Kaplan filed Notices of Appeal and applications for bail pending appeal, which applications were granted. Petitioner Berumen's Notice of Appeal was filed *in propria persona*. Present counsel were thereafter substituted as attorneys of record.

The United States Court of Appeals for the Ninth Circuit affirmed the judgment.

REASONS FOR GRANTING THE WRIT.

I. The decision of the Court of Appeals gives a scope and application of the law dealing with "effective assistance of counsel" so narrow and restrictive in interpretation that it erodes the constitutional guarantees provided by the Sixth Amendment to the United States Constitution as enumerated by this Court in *Glasser v. United States*, 315 U.S. 60 (1942). The basic issue involved here is the duty of a trial judge to insure that a trial is conducted with full consideration for the rights

of the accused. The court must protect and see that an accused is afforded effective assistance of counsel. (See *Glasser v. U.S., supra,* 315 U.S. 60, 71.) This is not a mere formality. All persons must have effective counsel if our system is to survive.

Although in *Glasser* this Honorable Court concluded that "[t]he right to have assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. . . ." (315 U.S. 60, 76), the Court did not specifically enumerate the actions which would be required of a trial judge to determine whether an accused was furnished *effective* assistance of counsel. It is submitted that the criteria which must be followed by the trial judge was wrongly determined by the Court of Appeals. Such issues are momentous and call urgently for the consideration and determination of this Court.

It will be recalled that originally Beckler, appearing for both Petitioners, moved for a continuance to permit Petitioner Kaplan adequate time to obtain new counsel due to an inherent and definite conflict of interest between Petitioners Kaplan and Berumen.

Mr. Beckler's statements established that there was a definite conflict of interest. Accordingly if Attorney Beckler had at this stage continued to represent Petitioners the record would clearly show that Petitioners were denied "the assistance of counsel" guaranteed by the Sixth Amendment. (*Glasser v. United States, supra,* 315 U.S. 60, 76.)

On March 30, 1965, court was convened without new counsel being present and/or substituted for either of Petitioners in place of Mr. Beckler. Thereafter, peti-

tioners both orally and in writing advised the trial judge that they desired to proceed to trial without a jury. After counsel also consented to such waivers, the court permitted them. It was then that Attorney Beckler notified the court that he believed that the conflict problem which he had earlier raised had been resolved because there was no longer a "contingency of a jury trial." *Petitioners also advised the court that they felt the conflict was resolved because their attorney so advised them.*

Summarizing the trial testimony regarding the instant issue, it is clear that Attorney Beckler had knowledge of an actual conflict in interest, and volunteered to procure new counsel for one of the Petitioners because of it. Attorney Beckler did not, however, procure such counsel, but instead told the court that the conflict had apparently been resolved because of the waiver of a jury trial. Petitioners, relying on Attorney Beckler's advice, agreed to continue with him as their counsel. Under such circumstances the qestion before this Court is two-fold—*i.e.,* namely (1) what duty was owed by the trial judge to inquire as to the nature of the conflict existing between Petitioners in order to ascertain whether they were being furnished effective assistance of counsel; and (2) whether Petitioners waived their right to question the same by statements they made based on their counsel's conclusion that the actual conflict in question had been resolved.

The Court of Appeals concluded that there could be no question of Petitioners being denied effective assistance of counsel because the trial judge had no obligation to inquire further once counsel for Petitioners advised him that the conflict in interest between Peti-

tioners had been resolved. The Court of Appeals concedes, however, that the trial court might inquire further, but that such inquiry is and is not a constitutional right. Such holding is in direct conflict with the rationale of *Glasser v. United States, supra,* 315 U.S. 60, and with the holding in *Campbell v. United States,* 352 F.2d 359 (D.C. Cir. 1965). In *Campbell* the District Court reversed the conviction of one of the defendants because his defense was substantially prejudiced by sharing counsel with his co-defendant. The record in the case was silent as to whether the defendants were sufficiently aware of the importance of having separate counsel. The court concluded:

> "When two or more defendants are represented by a single counsel, the District Court has the duty to ascertain whether each defendant has an awareness of the potential risk of that course and nevertheless has knowingly chosen it.
>
> ". . . In our opinion we have suggested that co-defendants are 'entitled to be represented by seperate counsel . . . [if] there was some inconsistency in joint representations.' (citation). We have also noted that defendants are unlikely to be sufficiently aware of their rights to object to a possible conflict of interest (citation). . . . The judge's responsibility is not necessarily discharged by simply accepting the co-defendants' designation of a single attorney to represent them both. An individual defendant is rarely sophisticated enough to evaluate the potential conflicts, and when two defendants appear with a single attorney it cannot be determined, absent inquiry by the trial judge, whether the attorney has made such an appraisal or has

advised his clients of the risks. Consideration of effective judicial administration as well as the important rights of defendants are served when the trial court makes the affirmative determination that co-defendants have intelligently chosen to be represented by the same attorney. . . . We must indulge every reasonable presumption against the waiver of the unimpaired assistance of counsel. (citation.)" (at pp. 360-361.)

Petitioners submit that under the *Glasser* and *Campbell* cases, *supra*, once a trial court is made aware of the fact that a definite or even potential conflict in interest exists between two or more accused criminals represented by the same attorney, the Court must inquire as to the nature of the conflict, even if counsel thereafter suggests that such conflict has been resolved. The individual defendant is not capable of knowing what legal problems a potential conflict might create. He must and should be able to rely on both his attorney and on the Court for help. This Court cannot prevent a rule requiring sole reliance upon the attorney.

For example, in the instant case the conduct of Mr. Beckler alone required further action by the trial court in order to protect Petitioners' rights as soon as Mr. Beckler became aware of the potential conflict he notified the court and requested a continuance to permit Mr. Kaplan to obtain new counsel. When, however, the court agreed to continue the matter for only two days, Mr. Beckler stated that he was busy then, and was similarly occupied for the balance of the month. He said *he* preferred to go to trial on the date originally set *which was the very same day he was making his Motion for a Continuance* (and provided to obtain and

adequately prepare other counsel by that afternoon). Attorney Beckler made such statements after first recognizing that it might not be possible for Petitioner Kaplan to obtain and have other counsel prepared even by Thursday of the week in question. [See R. 10.] It is obvious now and must have been clear to the trial court that Attorney Beckler's sudden change of mind concerning his clients conflicting interests was influenced far more by his reluctance, to go to trial and the alternative dates mentioned than by a sound judgment. The needs of petitioners Beckler is not the guardian of Petitioners' constitutional rights—but this Court is. They must be protected.

The demands of the Fifth and Sixth Amendments cannot be met if the trial judge is not required to ascertain for himself whether a known or potential conflict exists.

Under these circumstances the judge has several alternatives. He could refuse the waiver of a jury and inquire further into the potential conflict. He could remand the matter to the assigning trial court for further inquiry by that court or some other judge as to the nature of the conflict. He could request further information on the conflict himself, and thereafter, if satisfied that such a conflict did in fact exist and that the disclosure thereof to him might be prejudicial in his mind to the conduct of a fair trial, then disqualify himself. In the instant case no further inquiry was made and this, it is submitted, constitutes reversible error.

Turning to the question of Petitioners' alleged waiver of their right to assert that they received ineffective assistance of counsel, it is clear that no such waiver was made. The ultimate issue as to whether a defend-

ant competently waives his right to counsel is whether he knowingly and intelligently chooses to do so. (See *United States v. Smith*, 337 F.2d 49 (4th Cir. 1964).)

A brief perusal of Petitioners' applications for setting of bail pending appeal shows that neither Petitioner has any legal training nor is capable of making legal decisions without the advice of counsel. Unquestionably, they relied solely upon Attorney Beckler's advice. Under these circumstances there was certainly not an "intelligent, confident waiver" within the meaining of the *Glasser*, case, *supra*, 315 U.S. 60.

Insofar as Petitioners permitting Mr. Beckler to continue to represent both of them at trial, it is totally inconceivable that they could intelligently make such a decision without advice of other counsel or of the court in lieu of Mr. Beckler's representations that there would be no conflict if he continued to represent them. It must be remembered in this regard that this is not an action wherein two or more parties represented by the same counsel are continually aware of the conflict, but decide to continue with the same counsel despite the conflict. Petitioners herein relied upon Mr. Beckler's statements to them that the conflict had been resolved by virtue of the trial by court.

II. In holding that the trial judge had the absolute right to examine certain highly prejudicial reports and statements of government witnesses (commonly known as "Jencks Act" statements under Title 18, United States Code, §3500 (Appendix A, *infra*, pp. 3-5)), even though Petitioners did not consent or request such examination, the court below has decided a Federal question of substance which has not but should be settled by this Court.

Clearly, a fundamental concept of "due process of law" is that parties to controversies are entitled to have them determined by an impartial tribunal which is free from bias and prejudice. (*Lee v. Fleming,* 158 F. 2d 984, *cert. den.* 331 U.S. 805; *Baker v. Simmons Company,* 342 F. 2d 991 (1st Cir. 1965).)

In the instant case both the United States Treasury Secret Service Department report dated February 2, 1966 and the letter from the Treasury Department to Manuel L. Real, dated January 5, 1966 (both of which documents bear File No. J-4-3-CO-2344-11 and which are part of the record herein), contain numerous inadmissible hearsay and other objectionable matter, including information as to the prior criminal records and felony convictions of Petitioners. This information would otherwise never have come before the trial judge. (See *Enriquez v. United States,* 188 F. 2d 313 (9th Cir. 1951).) Petitioners submit that such examination was improper for any purpose under the facts of the case.

What factually transpired in the trial which brought to light this apparent error was that shortly after Agent Tomsic, Chief Prosecution Agent, took the stand on direct examination to present testimony in opposition to appellants' Motion to Suppress, and before testifying on direct examination on the substantive issues involved, counsel for all parties and the trial judge entered into the following discussion:

"Mr. Inman: May I inquire as to a separate matter of the court? Did Mr. Balaban present to the court a copy of Agent Tomsic's report?

"The Court: Let's see. There are three different documents here. One is a copy, I take it, of a

letter addressed on the letterhead of the Treasury Department to Manual Real with a second sheet headed 'Details of Offense.'

"Now, that is one, and then there are three pages, and on the fourth page is a list of exhibits A, B, and C.

"Then there is another document which apparently is on a form and it is a report made by Robert Tomsic, and that is the Form 1588 of the United States Secret Service, Treasury Department.

"Mr. Inman: I am somewhat uninitiated in the handling of reports of this nature. Off the top of my head, your Honor, I would not think that it was proper. I would not think it proper for Mr. Balaban to have presented to the trier of fact in this particular action a copy of the Agent's report, which I have read and which contains a substantial amount of hearsay and things of this nature. Now, I really don't know what the proper procedure or practice is.

"The Court: Ordinarily, if it weren't for the Jencks Act, I wouldn't give any of it to you; but, anything that pertains to the Jencks Act goes to the court.

"Mr. Inman: That is the only point I have inquired about.

"The Court: You see, oftentimes the court has to rule on these matters as to whether or not they have been given to counsel.

"Mr. Inman: I knew that Mr. Balaban's voluntary delivery of the statements to us, which we appreciate, of course, under Jencks, is proper. I

do not know whether under Jencks it was proper to give such reports to the trier of fact, your Honor.

"The Court: It usually goes to the trier of facts first; but, of course, the court is a trier without a jury. It doesn't change.

"Mr. Beckler: Can I address the court just in that regard, too? The only problem that is bothering me, your Honor, is that we didn't make a Jencks motion and therefore the court had no reason to rule on the admissibility of a witness' statement by virtue of 3500 US.

"The Court: These are merely statements for counsel to use in cross examination.

"Mr. Beckler: I understand that, your Honor, but I am wondering. When a Jencks problem arises, the court in camera usually reviews that to see which part the defense counsel will get. How about the academic problem where the question never arises? Does the court then have the rightful authority to read these statements? I am wondering.

"Mr. Balaban: Your Honor, if I may interject one thing: Not only are the documents handed to the court for the purposes of seeing whether they should be turned over to defense counsel, but they also have to be previewed by the court in order to find out which witness the document is a statement about. In other words, the Jencks Act doesn't cover all things said about all people. At the same time I handed both defense counsel a copy, at the request of the court I handed the court a copy of the documents.

"Mr. Beckler: That is true when the Jencks problem arises, but it hasn't arisen yet and I am wondering if the court in reading these is somewhat premature. I have no motion even. I can't very well move to strike the court's reading of these certainly, so at this time I will just sit down." [R. 159-162.]

The statements involved were presented by the United States Attorney to counsel for Petitioners and their co-defendant at trial *at the time Agent Tomsic was called to the stand.* [See R. 154-155.] Counsel for Petitioners strongly questioned the right of the Trier of Fact to examine such documents without there being a Motion made under Title 18, United States Code, §3500 *et seq.* Such statements were never offered into evidence either for substantive purpose or in connection with the Motion to Suppress.

The Court of Appeals did not queston the fact that the statements in issue were highly prejudicial. Instead, said Court concluded that the reading of such documents was "necessary and proper . . . in view of the pending Motion [to Suppress]." Such conclusion is clearly in conflict with the provisions of the Jencks Act and appropriate case law.

Under Title 18, United States Code, §3500, the defense has the right to make the demand for and receive the production of certain statements and reports of government witnesses. Subsection (a) thereof provides that no such inspection or discovery is proper until such time as the government's witness testifies on direct exam-

ination in the trial of the case. Sub-section (b) provides:

> "(b) After a witness called by the United States has testified on direct examination, the court shall, on *motion of defendant,* order the United States to produce any statement . . . of the witness in possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it delivered directly to the defendant for his examination and use." (18 U.S.C. §3500 (b).) (Emphasis added.)

Subsection (c) of §3500 states in part that if the United States makes a claim that any of the statements ordered to be produced under §3500 deal with matters not related to the subject matter of the testimony of the witness, then the court is directed to inspect the statements and delete the objectionable portions.

Case law dealing with these so-called "Jencks Act" statements makes it clear that these statements are not to be procured until and unless counsel for defendant requests same. (See *United States v. Tellier,* 255 F. 2d 441 (2nd Cir., 1958), cert. den. 358 U.S. 821, 79 S. Ct. 33, 3 L. Ed. 2d 62 (1958).)

As was stated in *Mims v. United States,* 332 F. 2d 944 (10th Cir., 1964), at page 948.

> ". . . the Jencks Act provides that after a witness called by the government has testified on direct examination, the court shall, on motion of defendant, require the government to provide any statement of the witness in possession of the government which relates to the subject matter of his testimony. (citation)."

The court in *Mims, supra,* further held that the trial judge was under no duty, absent some form of request, to have the government present such statements to the court and that the court was not a cross-examiner and strategist for the defense; the rationale of the court being that counsel for the defense might be content to rest with whatever psychological advantage cross-examination without the use of such statements might bring forth.

The fact that the statements herein were considered at the time a Motion to Suppress was before the trial court does not in any way conflict with the above rationale. Not is it reasonable to interpret from the facts any waiver by Petitioners of their objection to such examination. It is submitted that it was grossly inequitable and highly prejudicial to permit the trier of fact to examine the aforesaid statements without Petitioners requesting or agreeing to such examination.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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